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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 8[redacted] 46

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

STATEMENT AS TO JURISDICTION

Statement of Federal Question Involved in the Appeal

The question presented by this appeal is whether the California Sales Tax Act of 1933, Chapter 1020 of California Statutes, 1933, as amended by the Statutes of 1935, construed, applied and enforced, to permit and require a tax upon the sale of fuel oil to the New Zealand Stores Control Board for exportation from California to New Zealand, and which was so exported, is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States.

Statement of the Case

In February, 1934, appellant's predecessor in interest, whose obligations it assumed (Complaint, Par. III, R. 3-4),[1]

[1] The trial court found all averments of the complaint to be true (Finding I, R. 74). The Supreme Court did not question this finding in any of its decisions.

References to the facts stated, unless otherwise noted, will be to the averments of the complaint and to the pages of the typewritten Clerk's

entered into a contract in New Zealand with the New Zealand Government Stores Control Board, for the sale of fuel oil to be transported by a vessel of the New Zealand Government from California to New Zealand, the purchase price to be f. o. b. Los Angeles. The contract also provided that bill of lading and other customary documents should be delivered to the Master consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand (Complaint, Par. VI, R. 9).

Pursuant to the contract, the New Zealand Naval Tank Steamer "Nucula" came to the Marine Terminal, Long Beach where the appellant delivered to it 43,756.85 barrels of fuel oil. Bill of lading consigning the said oil to the Naval Officer-in-Charge at Auckland, New Zealand, was duly made out and the appellant filed in the Office of the United States Collector of Customs a Shipper's Export Declaration (Complaint, Par. VI, R. 10-11).

The appellee Board thereafter assesesd a tax of 3% on the gross purchase price which tax, with interest, amounted to $1,514.78 (Complaint, Par. V, R. 5), which appellant paid under protest, a copy of the protest being attached to the Complaint as Exhibit "A" (R. 16-18), and thereafter appellant duly filed a claim with said Board for a refund of said tax, copy of which is attached to the Complaint as Exhibit "B" (R. 18-26). The claim being denied, appellant instituted this suit in the Superior Court of the State of California in and for the County of Sacramento to recover the tax paid.

The Board filed an answer to the Complaint admitting all of the averments other than the allegation that the sale was an export sale (R. 26-28).

Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.

Opinions Below

The trial court rendered an opinion found in the transcript at pages 50-73, in which the court determined the entire transaction constituted an export sale, and entered Findings of Fact (R. 74-97) from which the court made the following Conclusions of Law (R. 98-99):

"I

"That the sale and delivery of the said oil to the R. F. A. 'Nucula' constituted and was an export sale of the said oil within the meaning of Article I, Sections 9 and 10, of the Constitution of the United States.

* * * * * * *

"IV

"That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforceable, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States."

Judgment was entered accordingly for appellant.

The Appellee Board duly appealed to the Supreme Court of California. The Federal questions herein considered were urged in the briefs of both parties.[2]

On December 30, 1944, the Supreme Court rendered its decision in bank affirming the judgment of the Superior Court, Justice Carter dissenting. The majority and minority opinions are unofficially reported in 155 Pac. 2d 1. A copy of them is attached as Appendix "A".

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[2] Under the California practice, there is no assignment of error; the questions presented are set forth only in the briefs.

Thereafter, a rehearing was granted and the opinion of the majority of the Court was entered reversing the judgment of the Superior Court, the Chief Justice and Justice Edmonds dissenting. This decision has not yet been officially reported. It is unofficially reported in 27 A. C. 150. A copy of the said majority and minority opinions is attached hereto as Appendix "B".

Statutory Provisions Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344 (a), 861a).

State Statute Involved

The statute of the State of California the validity of which is involved, is the California Retail Sales Tax Act of 1933, Chapter 1020 of California Statutes, 1933, and which was amended by Chapters 351, 355 and 357 of California Statutes, 1935.

Sec. 3 of the Retail Sales Tax Act as amended by Chap. 355, California Statutes, 1935, imposed a tax as follows:

> "Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes."

Sec. 2 of the Act defined "sale", "retail sale", "retailer" and "gross receipts" respectively as follows:

"(b) 'Sale' means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale."

"(c) A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property."

"(e) 'Retailer' includes every person engaged in the business of making sales at retail."

"(f) 'Gross receipts' means the total amount of the sale price of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall 'gross receipts' include the price re-

ceived for labor or services used in installing, applying remodeling or repairing the property sold."[3]

"* * *

Sec. 5 of the Act as amended by Chap. 355, California Statutes, 1935, provided an exemption as follows:

"Sec. 5. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."[4]

Date of Judgment and Application for Appeal

The decision of the Supreme Court on rehearing was filed on November 1, 1945. Under the California Rules on Appeal, the appellant had fifteen days within which to petition for a rehearing (Rule 27 (b)), and appellant duly filed its petition on the 14th day of November, 1945. On November 29th, 1945, the Supreme Court denied a rehearing and the decision became final. See:

Rule 24 of California Rules on Appeal.

Market Street Railway Company v. *Railroad Commission* (not yet officially reported), 89 L. Ed. 788.

The application for appeal was presented January 17, 1946.

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[3] There are other provisions in Sec. 2 (f) not set out because not applicable to any of issues involved in the case.

[4] The majority opinion of the Supreme Court in its last and final decision refers to the section of the Revenue and Taxation Code. That is a codification of the Sales Tax Act, and while the provisions are substantially the same as the sections of the Act quoted, it was not in force at the time of the sale or involved in the litigation, the taxable period involved being April 1 to June 30, 1937. (Complaint III, R. 5.)

Raising the Federal Question

The complaint in the trial court, in addition to incorporating the claim for refund (in which the appellant asserted that the California Statute if construed, applied, or enforced in such manner as to impose a tax on the said sale was in contravention of the provisions of Article I, Section 10, Clause 2 of the Federal Constitution (R. 24), directly averred in Paragraphs VIII and IX:

> "That said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5 (a) of the California Retail Sales Tax Act, as amended. That the taxation by the State of California of such sale in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America."
>
> "That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America" (R. pp. 14-15).

In the majority opinion of the final decision of the Supreme Court of the State of California, it is said:

> "Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. * * * 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, * * *.'"
>
> "It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution."
>
> *Richfield Oil Corporation* v. *State Board of Equalization*, 27 A. C. 150, 152.

Cases Believed to Sustain Jurisdiction

Standard Oil Company v. *Johnson*, 316 U. S. 481, 482-3;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 289;
First National Bank v. *Anderson*, 269 U. S. 341, 345-6;
U. S. v. *County of Allegheny*, 322 U. S. 174, 192;
Chicago, etc. Co. v. *Perry*, 259 U. S. 548, 551;
Sully v. *American National Bank*, 178 U. S. 289, 298;
Nickey v. *State of Mississippi*, 292 U. S. 393, 394;
Whitfield v. *Ohio*, 297 U. S. 431, 435-6.

Statement of Grounds upon Which It Is Contended the Questions Involved Are Substantial

The majority opinion of the California Supreme Court in its last decision based its conclusion that the statute as construed was not repugnant to the Constitution upon three grounds:

1. That, as title passed upon delivery of the oil to the purchaser's vessel, the sale was completed within California, and that the export did not commence until the "Nucula" started to New Zealand.

2. That in effect, the power of the States to tax exports is coextensive with and subject to the same limitations as their power to tax interstate commerce transactions, and hence a sales tax on exports is valid if the same tax is laid on intrastate sales, notwithstanding the constitutional prohibition against any tax by a State upon exports.

3. The tax can probably be sustained as a license tax for the privilege of doing business within the State of California.

We submit all three grounds are erroneous and contrary to the unbroken line of decisions of this Court.

(1) *The decision of the majority of the California Supreme Court that the exportation of oil did not commence until the "Nucula" actually started for New Zealand would practically destroy the constitutional prohibition against state taxation of exports.*

If this portion of the decision be allowed to stand and thus to establish the law that the exportation of goods, sold under a contract calling for their exportation, has not commenced until the vessel which is to transport them to the foreign purchaser has been started on its journey, it is apparent that the constitutional inhibition against State taxation on exports is of no practical value. Such a rule would defeat the very object sought to be effected by the Constitution. If, as held by the majority opinion of the California Supreme Court, goods are not in the process of exportation until after they have been first loaded into a vessel and the vessel commenced its journey to the foreign port, the seaboard states at whose ports the goods were loaded upon the vessel could, as they did before the Constitution, levy any taxes they saw fit. See:

United States v. *Hvoslef*, 237 U. S. 1, 13;
Fairbank v. *United States*, 181 U. S. 283, 292-3.

The decision of the majority of the Supreme Court of California is contrary to the unbroken line of decisions of this Court that the exportation of goods commences with their first movement towards the sea. See:

Texas & N. O. R. Co. v. *Sabine Tram. Co.*, 227 U. S. 111, 123;
Railroad Commission of Louisiana v. *Texas & P. R. Co.*, 229 U. S. 336, 341;
A. G. Spalding & Brothers v. *Edwards*, 262 U. S. 66, 68-9;
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498.

The trial court found that as the "Nucula" approached the Marine Terminal, oil was pumped from appellant's refinery at Watson to its storage tanks at the Terminal, and as soon as the "Nucula" had docked and was ready to receive the oil, it was pumped from the storage tanks in continuous flow into the tanks of the "Nucula" (Findings VI to VIII, R. 82-83). From these facts and the decisions above cited, the trial court concluded in its written opinion that the exportation of the oil commenced when the appellant started pumping it from its refinery (R. 52-53). This view was adopted by the Supreme Court in its first opinion. There, speaking through the Chief Justice, the majority of the Court said, citing *Cornell* v. *Coyne*, 192 U. S. 418, 24 S. Ct. 383, *A. G. Spalding & Brothers* v. *Edwards*, 262 U. S. 66, 43 S. Ct. 485, and other decisions of this Court:

> "On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed.
>
> • • • • • • •
>
> "Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied."
> 155 Pac. 2d 1, 3.

It is submitted that *A. G. Spalding & Brothers* v. *Edwards, supra*, is not factually or legally distinguishable from the instant case.

In its final decision, the majority opinion of the California Supreme Court, holds that the *Spalding* case has, in effect, been overruled by subsequent decisions dealing with the power of the States to tax interstate commerce transactions.

The Chief Justice in his dissenting opinion in which Justice Edmonds concurred, concluded that the decision of this Court in *A. G. Spalding & Brothers* v. *Edwards, supra,* is controlling and required an affirmance; that the law was not concerned with the means of shipment where the means chosen guaranteed continuity of the export and foreign delivery in good faith.

We submit this view is correct and in accord with the decisions of this Court. Further, that the majority opinion of the Supreme Court of California in its final decision entirely ignored the essential character of the transaction.

The Constitution prohibits a tax upon an export sale without regard to the vesting of title, and this Court has consistently so held; also, that the character of the sale, whether interstate, import or export, is to be determined from an examination of the entire transaction, the substance and not the form of which is controlling. See:

Hooven & Allison Co. v. *Evatt,* 65 S. Ct. 870, 89 L. Ed. (Adv.) 852, 858-9;

Pennsylvania Railroad Co. v. *Clark Bros. etc. Co.,* 238 U. S. 456, 466;

Dahnke-Walker Milling Company v. *Bondurant,* 257 U. S. 282, 292;

Hughes Bros. Timber Co. v. *State of Minnesota* (Minn.); 272 U. S. 469, 473;

A. G. Spalding & Brothers v. *Edwards, supra,* 262 U. S. 66, 68-9.

(2) *The power of the States to tax exports is not co-extensive with their power to tax interstate commerce transactions.*

In the majority opinion of the California Supreme Court it is said after discussing decisions of this Court sustaining nondiscriminatory taxes on interstate transactions:

> "There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions.
>
> "• • •
>
> "Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax."
>
> 27 A. C. 150, 156.

We submit that the majority opinion of the California Supreme Court overlooks the fundamental differences in the constitutional provisions with reference to the two classes of taxes.

There is no constitutional prohibition against State taxation of interstate commerce transactions other than that which is to be implied from the grant to Congress of the power to regulate such commerce. Hence, nondiscriminatory State taxes upon interstate commerce which do not so directly burden it as to amount to an interference with the power of Congress to regulate such commerce encounter no constitutional inhibition.

Such is not the case as to exports. The constitutional prohibition is clear, explicit and all embracing that the States, without the consent of Congress, cannot tax exports. This distinction has been frequently and emphatically pointed out in the decisions of this Court. See:

Hooven & Allison Co. v. *Evatt*, 65 S. Ct. 870, 877, 89 L. Ed. (Adv.) 852, 860;

American Steel & Wire Company v. *Speed*, 192 U. S. 500, 520-1;

Fairbank v. *United States, supra*, 181 U. S. 283, 306;

Woodruff v. *Parham*, 8 Wall. 123;

Sonneborn Bros. v. *Keeling*, 262 U. S. 506.

"In arguing the case of M'Culloch v. Maryland, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, '* * * the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent'."

United States v. *County of Allegheny*, 322 U. S. 174, 176.

(3) *The suggestion of the majority opinion that the tax can be sustained as an excise tax is clearly erroneous.*

The majority opinion of the Supreme Court of California suggests, rather than directly holds, that the tax can be sustained as a privilege for doing business within the State of California. Thus, it is said at page 151:

"Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers 'for the privilege of selling tangible personal property at retail * * *'."

and again at the close of the opinion:

"In the instant case the tax imposed was a uniform non-discriminatory excise tax on the privilege of doing business in this state."

Richfield Oil Corporation v. *State Board of Equalization*, 27 A. C. 150, 151, 156-7.

While the State can impose a license tax for the privilege of doing business within the State, obviously it cannot impose a license tax for doing an export or import business within the State since that is directly prohibited by the Constitution. See:

Brown v. *Maryland*, 12 Wheat. 419, 7 Curtis, 262, 263, 269, 270.

"Since Brown v. Maryland, 12 Wheat. 436, 6 L. Ed. 684, it has not been open to question that taxation imposed by the states upon imported goods, whether levied directly on the goods imported or indirectly, by burdening the right to dispose of them, is repugnant to that provision of the Constitution * * *."

American Steel & Wire Co. v. *Speed, supra,* 192 U. S. 500, 519.

See: *Hooven & Allison Co.* v. *Evatt,* 65 S. Ct. 870, 875-6, where it is stated that there has never been any deviation from the rule of *Brown* v. *Maryland, supra.*

Obviously, a tax on the privilege of making an export sale is, in effect, a tax upon the sale itself.

The Federal Question Involved Is One of Vital Public Interest

While the amount sought in the suit involves a tax of principal and interest of slightly in excess of $1500, we are informed by the Attorney General's Office that assessments on similar sales of oil by other companies in excess of a million dollars are awaiting final determination of this suit, and we know that the enforcement of other similar assessments against this appellant of approximately three hundred thousand dollars are being so held. But of far greater importance to the public is the fact that the decision must affect every future export sale in all of the States.

Conclusion

We respectfully submit that the Federal question involved is substantial and of exceptional public interest and importance; and that this Court has jurisdiction of the appeal.

Dated: Los Angeles, California, January 17, 1946.

Respectfully submitted,

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APPENDIX "A"

Decision of the Supreme Court of the State of California, December 30, 1944

GIBSON, *Chief Justice:*

This is an appeal from a judgment for plaintiff in an action to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon.

Plaintiff is a foreign corporation authorized to do business in California and engaged in producing, refining and selling crude oil and crude oil products. On December 3, 1936, the New Zealand Government, acting through its official purchasing agency, the Stores Control Board, invited bids for the supply of fuel oil required by the New Zealand Division of the Royal Navy. The invitation provided that bids were to be for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff instructed its agent in New Zealand to submit a bid specifying that the price quoted was f.o.b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. Plaintiff's bid was accepted and a written contract for the sale of oil was entered into in New Zealand on February 4, 1937. The contract contained, among other, the following provisions: "(1). Price * * * F.o.b. Los Angeles, payment in London, * * * (3). Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank Steamer R. F. A. 'Nucula' at Los Angeles, California. (7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading * * *, such advance to be repaid when payment is made for the fuel oil. (8). Bills of lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Office-In-Charge, Auckland, New Zealand."

On May 14, 1937, pursuant to the contract, plaintiff delivered the oil into the "Nucula" at Long Beach, California.

The oil was processed at plaintiff's refinery at Watson and piped to its storage tanks at Long Beach, from which it was loaded aboard the vessel. Following such delivery, plaintiff handed to the master of the vessel customary shipping documents, including a bill of lading designating plaintiff as shipper and providing for delivery unto the Naval Officer in Charge at the Port of Auckland, New Zealand. Plaintiff also filed with the United States Collector of Customs a Shipper's Export Declaration, which reported the shipment by plaintiff from Long Beach, California, to Auckland, New Zealand. Thereafter, the entire supply of oil was delivered to the New Zealand Division of the Royal Navy at Auckland, and payment therefor was made to plaintiff in London, England.

On September 25, 1940, defendant assessed a retail sales tax against plaintiff measured by gross receipts from the foregoing transaction. Plaintiff paid the tax with interest, a total of $1,514.78, under protest on July 7, 1942. In September, it filed a claim for refund which was denied. The present action was then commenced.

The cause was submitted to the trial court on the pleadings and on stipulation of fact entered into by the parties. The trial court found, in addition to the facts heretofore recited that oil had never been produced in New Zealand in sufficient quantities to supply the needs of the New Zealand Division of the Royal Navy, that plaintiff had previously made a shipment of oil to New Zealand under identical circumstances, and that it had always been the intent of the parties to the contract that the oil would be exported to New Zealand without interruption. The court concluded that plaintiff was entitled to a refund of the amount paid, together with interest thereon, and entered judgment accordingly. This appeal followed.

The California Sales Tax Law imposes a tax upon retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail," and authorizes retailers to collect the tax from the consumers. (Revenue and Taxation Code, §§ 6051, 6052.) A sale is defined therein as "any transfer of title or possession . . . in any manner or by any means whatsoever, of

tangible personal property * * *." (§ 6006.) By express provision of the law, gross receipts from sales of property which the state is prohibited from taxing under the Constitution of the United States are exempt from computation of the amount of tax imposed. (§§ 6351, 6352.)

The sale or taxable event in the present case occurred when the fuel oil was loaded aboard the tanker "Nucula" at Long Beach, California, it being conceded that title to the oil passed to the New Zealand Government at that time. In support of the judgment, however, plaintiff contends that gross receipts from the sale were not subject to taxation under the law by reason of the prohibition of the federal Constitution that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's (its) Inspection Laws." (Art. I, § 10, cl. 2.) Defendant contends, on the other hand, that the sale of oil preceded its exportation and consequently was a local transaction subject to state taxation. It further contends that even if the oil attained the status of an export prior to the sale, the "export-import" clause of the Constitution does not prohibit the imposition of a sales tax based on that transaction.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, goods not intended for export when a general tax is laid on all property alike, are not exempt therefrom because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (Turpin v. Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504.) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and

constitutionally cannot be taxed. (Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865; see Peck & Co. v. Lowe, 247 U. S. 165, 175, 38 S. Ct. 432, 62 L. Ed. 1049; Turpin v. Burgess, supra, 117 U. S. at page 506, 6 S. Ct. 835, 29 L. Ed. 988; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 478, 29 L. Ed. 715.) It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (Cf. Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; Texas & N. O. R. Co. v. Sabine Tram. Co., 227 U. S. 111, 33 S. Ct. 229, 57 L. Ed. 442; Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.)

Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied. The case of A. G. Spalding & Bros. v. Edwards, supra, is substantially on all fours with the present case and the decision of the United States Supreme Court therein is, of course, controlling. In that case, Delgado & Compania, a Venezuelan firm, requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from the plaintiff, instructing it to deliver the same to a specified exporting carrier in New York addressed to Delgado & Compania. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to Delgado & Compania in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, 262 U. S. at page 69, 43 S. Ct. at page 486, 67 L. Ed. 865, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred

the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5 of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (Turpin v. Burgess, 117 U. S. 504, 506, 6 S. Ct. 835, 29 L. Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, 687.) Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. The distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cf. Turpin v. Burgess, supra, 117 U. S. at page 507, 6 S. Ct. 835, 29 L. Ed. 988; Superior Oil Co. v. Mississippi, 280 U. S. 390, 396, 50 S. Ct. 169, 74 L. Ed. 504; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 29 L. Ed. 715.) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the Goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But, as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account."

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in the light of all the circumstances, satisfies that inquiry. The transaction in issue featured a contract negotiated and entered into in New Zealand for the sale of fuel

oil to supply foreign needs. Under that contract plaintiff was obligated to deliver the oil to the order of "Naval Secretary, Navy Office, Wellington" into the tanker "Nucula" at Long Beach, furnish the master of the tanker with customary shipping documents, including a bill of lading consigning the oil to the "Naval-Officer-In-Charge, Auckland, New Zealand," and advance a sum equal to £300 to the master to meet disbursements at the port of loading. Plaintiff performed the obligations of its contract. It also executed an export declaration, and, as provided in the contract, received payment for the oil in London, England. From the inception of negotiations the parties contemplated an exportation of oil, and the oil was in fact exported to New Zealand. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. As stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "To put it at any later point would fail to give to exports the liberal protection that hitherto they have received."

The present case is even stronger than the Spalding case, for where as here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier.

Defendant argues that unless the Spalding case is distinguished or overruled an anomalous situation will exist in that the sale in the present case would have been taxable had the oil been intended for and transported in interstate commerce. It cites Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; Superior Oil Co. v. Mississippi, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504; and Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910, in support of the constitutionality of such a tax under the commerce clause. While a few cases have suggested that the prohibitions of the commerce and export-import clauses of the Constitution are substantially identical insofar as taxation is concerned (Crew-Levick Co. v. Pennsylvania, 245 U. S. 292,

295, 38 S. Ct. 126, 62 L. Ed. 295; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678), other cases have rejected even an analogy between the two. (Sonneborn Bros. v. Cureton, 262 U. S. 505, 43 S. Ct. 643, 67 L. Ed. 1095 (refusing to apply original package doctrine to sales of articles transported in interstate commerce); Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; cf. Fairbank v. United States, 181 U. S. 283, 306, 21 S. Ct. 648, 45 L. Ed. 862.) And, in two of the three cases involving the commerce clause cited by defendant, the Spalding case was expressly distinguished on the ground that it involved the export-import clause of the Constitution. (Superior Oil Co. v. Mississippi, supra; Standard Oil Co. v. Johnson, supra.) The distinction thus drawn between cases involving exports and cases dealing with interstate commerce is not without basis. Section 10, clause 2 in terms prohibits state taxation of exports, while section 8, clause 3 merely commits the regulation of commerce to the federal government. Modern authorities recognize that those engaged in interstate commerce must pay their just share of state tax burdens, and that a state tax infringes the authority of Congress over interstate commerce only when it discriminates against or directly burdens such commerce. (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.) Defendant itself asserts that under the commerce clause "The question of where interstate or foreign commerce begins is wholly separate and apart from the question of what events occurring within a state are taxable."

Defendant advances two arguments in support of the contention that the tax imposed in the present case, although based upon gross receipts from the sale of oil in the process of exportation, does not violate article I, section 10, clause 2 of the Constitution: First, the tax is one imposed on retailers for the privilege of selling and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition. Second, the constitutional prohibition against state taxation of exports does not apply to exports originating in the taxing state. In our opinion, neither argument is sound.

In the early case of Brown v. Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2 since it was a tax on the person rather than the article, the Supreme Court said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that, a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, it was expressly held that a state license tax on wholesale venders of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (Cf. United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862.)

The case of Crew-Levick Co. v. Pennsylvania, supra, is also authority for the proposition that the constitutional protection of exports is not limited to exports originating outside the taxing state. There, the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2 was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 134, 135, 75 U. S. 123, 134, 135, 19 L. Ed. 382), the prohibition is general in its terms. As stated in Blount v. Munroe, 60 Ga. 61, 67, "The constitution does not prescribe that no state shall levy such a tax on exports of articles brought from other states to

her seaport towns, but simply and without exception, it lays the ban of prohibition upon all exports."

The judgment is affirmed.

Shenk, Curtis, Edmonds, and Schauer, JJ., concurred.

Traynor, J., did not participate therein.

CARTER, Justice (disenting):

I dissent. In arriving at the conclusion that the plaintiff is exempt from the payment of sales tax upon the transaction in controversy, the majority of this court has ignored the more recent cases decided by the United States Supreme Court, and has based its decision upon what may be termed the old approach as applied to interstate and foreign commerce. Under that approach a state is entirely inhibited from coming into contact with that commerce through its taxing power. On the other hand, cases decided by the United States Supreme Court since 1937 signify a new approach, whereby complete immunity from various state taxes which resulted from the earlier doctrine has been repudiated. (See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272; McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188.) The essence of these decisions is recognition that not all state taxation is to me condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce.

In McGoldrick v. Berwind-White Coal Min. Co., supra, a New York City tax upon the sale of goods for consump-

tion was upheld as applied to a Pennsylvania corporation engaged in the production of coal in Pennsylvania and delivered by it to customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states or foreign nations to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A. L. R. 1229, a tax on a foreign corporation's privilege of doing business was sustained. Liability was not imposed until the declaration of dividends payable to out-of-state stockholders. The court stated that, "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

In Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188, the Indiana Gross Income Tax Act of 1933, c. 50, was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for

interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, which arose under the same taxing act of Indiana, was distinguished. There the tax was laid upon receipts from sales where delivery was made to customers in other states and abroad.

The California sales tax here under discussion has been held applicable to a sale of petroleum products within the state to purchasers intending to tranport the products out of state. Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910. In that case delivery of some of the items was made f. o. b. the purchasers' tank cars. See, also, O'Kane v. State, 283 N. Y. 439, 28 N. E. 2d 905, and Trotwood Trailers v. Evatt, 142 Ohio St. 197, 51 N. E. 2d 645, upholding the validity of similar taxes, based upon local transactions prior to interstate transportation.

While all of the foregoing cases involved interstate commerce, and no case has arisen wholly concerned with foreign commerce since the advent of the modern view, yet those cases are authority in the field of foreign commerce, for the destination has no effect on the character of acts completed in a state. Otherwise the anomalous situation exists, that an act which is local if done where goods are intended for interstate commerce, is not local if done where goods are intended for foreign commerce, and California must accord a discriminatory favor to purchasers of commodities which go to a foreign country instead of a sister state or intrastate. If the imposition of a nondiscriminatory tax upon the privilege of selling, such as is the California sales tax, conditioned upon a sale and the passing of title by delivery within the borders of the state is not a regulation of commerce, nor a burden thereon, forbidden by article I, section 8, clause 3 of the federal Constitution, then it must follow as a matter of course that it is not an "impost" or "duty" on exports within the meaning of article I, section 10, clause 2 of that Constitution. It is to be noted that we do not have before us any form of direct tax on goods intended for export, or on the privilege of

exporting, and the tax is not measured in terms of export or import. The California Retail Sales Tax is a general excise tax on the privilege of selling, a distinctly local activity, as distinguished from a personal property tax or a tax on the sale or because of the sale. Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156, 78 P. 2d 731, 117 A. L. R. 838; Roth Drug, Inc., v. Johnson, 13 Cal. App. 2d 720, 57 P. 2d 1022. To export is to send merchandise from one country to a foreign country. Exportation is the act of sending or carrying merchandise from one country to another. (1 Bouv. Law Dict., Rawle's Third Revision, p. 1161; Black, Law Dictionary.) An export tax falls upon the one who takes the goods out of the country. Krauter v. Menchacatorre, 202 App. Div. 200, 195 N. Y. S. 361. In Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 1095, 29 L. Ed. 257, the court said, "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." The California Retail Sales Tax is neither of these. The act of exportation in the case at bar is an immaterial consequence, subsequent to the occurrence of the taxable event, to wit: the transference of title and possession by delivery within the borders of this state. The mere fact that the goods were delivered on board a ship instead of inland to the purchaser does not transmute the fundamental nature of the tax. Furthermore, constitutional history discloses that the primary intent and purpose of article I, section 10, clause 2, was to prevent the seaboard states from benefiting, because of their location, at the expense and to the detriment of the remainder of the states. This much the majority opinion concedes. It was not intended to prevent the imposition of general taxes upon local privileges merely because goods were to be exported. Woodruff v. Parham, 8 Wall. 123, 134, 19 L. Ed. 382; The Federalist, No. 42; Story, Constitution, p. 714 (4th ed.); Warren, Making of the Constitution, p. 557. However, as pointed out in the majority opinion, the prohibition not being limited in terms, has been applied

to exports originating in the seaboard states. Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295. But the attitude of the United States Supreme Court, now recognizing the definitely local attributes of transactions also having foreign consequences, and the right of the states to deal therewith, makes possible more nearly the attainment of the original purposes of the constitutional provision, by preserving the right of the states to impose general taxes not aimed at foreign commerce, even though a state may still be prohibited from directly levying upon its own exports by virtue of the broad terms of the clause.

The majority opinion in reaching a contrary result relies principally upon the case of A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865. That case decided back in 1923 is distinguishable in a number of its aspects from the case at bar. The tax was not conditioned upon any local activity of the taxpayer or the consummation of any transaction within a state. It was not imposed by a state government but by the federal government itself, and was an excise tax upon the goods themselves. It was vitiated under article I, section 9, clause 5 of the Constitution. Further, delivery of the merchandise was made by the taxpayer to a common carrier which in turn transported the goods to the purchaser in a foreign port. In the case at bar the purchaser came to this country, received the goods and was thereafter free to take them wherever it chose.

In rejecting appellant's contention that the tax imposed in the case at bar is one imposed on retailers for the privilege of selling, and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition, the majority opinion cites Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, and Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, both of which dealt with license taxes upon importers. In the former case the tax in the form of a license actually and potentially discriminated against domestic products or dealers therein, and in the latter case the tax was measured by gross receipts from sales and not conditioned upon the exercise of the taxpayer's franchise or any other local privilege. Cf.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 310, 312, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; McGoldrick v. Berwind-White Coal Min. Co., supra, 309 U. S. at pages 57, 58, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. A $3.00 imposition upon wholesale vendors doing business within the state in both internal and foreign commerce was not questioned. It was similarly urged in McGoldrick v. Berwind-White Coal Min. Co. supra, that the conclusion there reached was inconsistent with the line of decisions following Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. It was noted that in some instances these taxes were aimed at suppression or placing at a disadvantage interstate business in favor of intrastate sales and otherwise these cases were tacitly disapproved, the court deeming it sufficient to say that the rule of Robbins v. Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, had been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate and that the effect on commerce of such a tax was wholly wanting in the present case.

It follows from the foregoing considerations that I cannot agree with my associates in holding that the California Retail Sales Tax on the privilege of selling, which is accomplished within the state, and is nondiscriminatory in its elements, is an "impost" or "duty" within the purview of article I, section 10, clause 2, of the Constitution. Included in such a tax is no evil which the framers of the Constitution could be supposed to have intended to prevent. They were concerned with taxes which might be imposed because of the foreign character of the goods or resulting in the exaction of tribute because of that character. Woodruff v. Parham, supra; Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015. To otherwise hold is to disregard the underlying concept of the late cases reviewed herein, recognizing that transactions completed wholly within a state may be so related to privileges which the state is authorized to

grant or deny as to warrant sustaining of their existence solely because of such relationship.

To my mind, it is perfectly absurd to say that the framers of the Constitution of the United States ever contemplated the proscription of such a tax, and it requires a most conservative and strained interpretation of its provisions to arrive at the conclusion reached in the majority opinion.

Simply stated, we have a situation where a product—"oil"—was produced, refined and stored, and finally sold and delivered by plaintiff to a purchaser in California. The plaintiff as such producer has enjoyed the privilege of doing business in California, the protection of its laws, and the service of its governmental agencies. It now seeks to evade the payment of a purely nondiscriminatory excise tax on the privilege of selling its products, under the specious argument that because it is selling such products to a foreign government for foreign consumption, such tax amounts to an impost or duty on exports and is invalid as being a contravention of article I, section 10, clause 2 of the Constitution of the United States. I say without fear of refutation that no court in this country has ever held such a tax invalid under the factual situation here related. It is the modern concept that the tax burden should be distributed in accordance with the benefits received and the ability of the taxpayer to pay, but under the majority decision in this case the plaintiff is escaping its fair share of the tax burden of this state, which means the shifting of its share of such burden to other taxpayers. Furthermore, the effect of this decision will be to permit the oil companies of this state to recover from the state all of the sales taxes which they paid on the huge quantities of oil sold by them to Japan prior to Pearl Harbor, if they have protected their right to such recovery, as I presume they have. Such recovery will no doubt amount to millions of dollars and will have a serious effect upon the revenues of the state. It seems clear to me that such a result should not be reached in the absence of a clear and positive constitutional mandate which is not present in this case.

In my opinion, the judgment should be reversed.

APPENDIX "B"

Second and final decision of the Supreme Court of the State of California, November 1, 1945.

CARTER, J.:

This is an appeal from a judgment for plaintiff in an action to recover retail sales tax paid under protest.

Plaintiff, a corporation, is engaged in producing and selling oil and oil products in California. The New Zealand Government for use by its navy invited offers to sell oil to it for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff, in the course of its business, submitted an offer with the price quoted f.o.b. ship's rail of buyer's tanker at its storage terminal at Long Beach, California. Pursuant thereto a contract of sale was executed specifying that "(1) Price * * * f.o.b. Los Angeles, payment in London, * * * (3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, *into* N. Z. *Naval tank steamer* R. F. A. 'Nucula' *at Los Angeles, California.* * * *

"(7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

"(8). Bills of Lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand."

Pursuant to the contract plaintiff delivered oil from its storage tanks into the "Nucula" at Long Beach, California. Documents including a bill of lading naming plaintiff as shipper and stating that delivery would be made to the naval officer at Auckland, New Zealand, were delivered to the master of the vessel. Plaintiff also executed a shipper's export declaration, naming it as shipper. The oil reached New Zealand and was paid for in London. It is conceded

that title to the oil passed to the buyer when plaintiff de-delivered it into the tanker at Long Beach, California.

The trial court found the following facts in addition to the foregoing: That oil had never been produced in New Zealand in sufficient quantities for that country's needs, and plaintiff had made other sales of oil to the buyer under similar circumstances; that the parties intended that the oil would be exported to the buyer without interruption.

Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers "for the privilege of selling tangible personal property at retail • • •" (Rev. & Tax. Code, §§ 6051, 6052.) The retailers are authorized to collect the tax from the consumers. (Rev. & Tax. Code, §§ 6051, 6052.) A sale is "any transfer of title or possession, • • • in any manner or by any means whatsoever, of tangible personal property for a consideration, • • •" (Rev. & Tax. Code, § 6006.) In the present case the transfer of possession and title took place in California.

In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." (*Western L. Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838); see also *National Ice etc. Co.* v. *Pacific F. Exp. Co.*, 11 Cal. 2d 283 (79 P. 2d 380); *De Aryan* v. *Akers*, 12 Cal. 2d 781 (87 P. 2d 695); *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758 (76 P. 2d 1184); *Roth Drug Inc.* v. *Johnson*, 13 Cal. App. 2d 720 (57 P. 2d 1022).)

Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. "The Congress shall have power • • • To regulate Commerce with foreign Nations, and among the several States • • •", (U. S. Const., art. I, § 8, cl. 3). "No Tax or Duty shall be laid on Articles exported from any State." (U. S. Const., art. I,

§ 9, cl. 5.) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress." (U. S. Const., art. I, § 10, cl. 2.)

It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution. There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions. The tax falls equally on all transactions without distinction. The tax is not on export business as such nor on the articles in export. Thus, the only theory upon which it may be said that the tax cannot be applied here is, that the property had already been launched upon its export journey when the sale was consummated and the tax attached to the sale, or, stated another way, the sale was an inseparable part of the exportation and therefore could not be subject to the tax. But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, occurred prior to the commencement of the exportation. The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred. If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobille and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered

if he gave the retailer an affidavit that he was taking the banjo to Mexico.

When a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. (*Brown v. Houston*, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) Nor are goods exempt from such tax on the ground that they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504).) It has been said that goods exported to a foreign country do not lose their character as a part of the common mass of property in the state from which exported [illegible] have been shipped, or entered with a common [illegible] for transportation to another State, or have begun [illegible] such transportation in a continuous route or [illegible] (*Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) And also that " 'Whenever a commodity has *begun to move* as an article of trade from one State to another, commerce in that commodity between the States has commenced.' " But *this movement does not begin until the articles have been shipped or started for transportation* from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (Emphasis added.) (*Coe v. Errol*, *supra*, 528.)

The cases of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), do not compel a different result. In the Spalding case the property had commenced its journey by being committed to a common carrier, an instrumentality whose sole function is transportation in commerce. Hence, when it was delivered to the carrier the process of exportation had begun.

In any event both the Spalding case and the Crew-Levick case must be considered as expressing narrow views with reference to the field of state taxation which have been superseded by the recent decisions of the United States Supreme Court. In that connection it should be noted that in the Crew-Levick case, the argument was based upon both the ban against state imposition of imposts on exports and the power over foreign commerce, yet the court treated the case as a proper one for applying the rules applicable to state taxes where interstate commerce is involved. The court stated: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, * * * is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." (*Crew-Levick Co. v. Pennsylvania, supra,* 295.) And after discussing authorities dealing with interstate commerce, it is said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." (*Crew-Levick Co. v. Pennsylvania, supra,* 296; see also *Brown v. Maryland,* 12 Wheat. (U. S.) 419 (6 L. Ed. 678); but see *Sonneborn Bros. v. Cureton,* 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095).)

The new approach to the problem of the collision between state taxation and interstate commerce has been developed in many authorities. (See *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944); *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307 (58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429); *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434 (59 S. Ct. 325, 83 L. Ed. 272); *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U. S. 33 (60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229); *Department of Treasury v. Wood Preserving Corp.,* 313 U. S.

62 (61 S. Ct. 885, 85 L. Ed. 1188); *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (64 S. Ct. 1019, 1030, 88 L. Ed. 1313); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 349 (64 S. Ct. 1023, 1030, 88 L. Ed. 1304, 1319); *General Trading Co. v. Tax Com.*, 322 U. S. 335 (64 S. Ct. 1028, 88 L. Ed. 1309). The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce. For illustration in *McGoldrick v. Berwind-White Min. Co., supra*, a New York City tax upon the sale of goods for consumption was upheld as applied where a Pennsylvania corporation engaged in the production of coal in Pennsylvania delivered it to its customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), the Indiana Gross Income Tax Act of 1933 was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f.o.b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended

for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana.

General Trading Co. v. Tax Com., supra, involved an Iowa use tax. A sale of property was made in Minnesota to Iowa customers, the contract of sale being completed in Minnesota and the goods delivered to a common carrier there for shipment to Iowa.

The case of *International Harvester Co. v. Dept. of Treasury, supra,* concerned an Indiana tax levied on gross receipts from sales, particularly dealing with "(1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where the goods are shipped from out-of-State points to the buyer." (322 U. S. 340.)

Under the foregoing authorities it is perfectly clear that had this been an intrastate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states.

Reference is made to *Hooven & Allison Co. v. Evatt,* — U. S. — (65 S. Ct. 870, — L. Ed. —) where Ohio sought to tax property imported by the taxpayer from the Philippine Islands while it was still in its original package and was held by the importer for manufacture. It was held not taxable but the court was particularly concerned with the original package doctrine and by applying it concluded that the importation had not ended. In the instant case the export had not begun and we have no question of the invocation of that doctrine. Moreover, it is difficult to ascertain the precise holding of that case inasmuch as the opinion written by Mr. Chief Justice Stone, held two things: (1) That the shipment from the Philippine Islands was an import because that territory was not a part of this country and hence the provision against imposts on imports applied, and; (2) That the property was not taxable

under that provision. Justices Black, Douglas, Rutledge and Murphy dissented on the second point. Although Mr. Justice Reed apparently joined in the judgment reversing the state court's conclusion of taxability, he dissents on the first issue and his reasoning is of the character generally found in discussions as to the validity of state taxes where interstate commerce is involved.

In the instant case the tax imposed was a uniform nondiscriminatory excise tax on the privilege of doing business in this state. The transaction which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state. The tax imposed was in no sense a tax on exports and became effective before the oil started on its export journey. For these reasons it is clear that the tax was not imposed in violation of any of the provisions of the Constitution of the United States, and is therefore valid.

The judgment is reversed.

Shenk, J., Schauer, J., Spence, J., and Peters, J., pro tem, concurred.

GIBSON, C. J.:

I dissent.

Under the prevailing decisions of the United States Supreme Court the tax imposed in the present case is prohibited by the "import-export" clause of the Constitution of the United States which provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. * * *" (Art. I, § 10, cl. 2.) Since the question is entirely one of federal law, we are bound by those decisions.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, where a general tax is laid on all property alike, goods not then intended for export are not exempt because they hap-

pen to be exported afterwards. (Brown v. Houston, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504).) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. (*A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865); see *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 175 (38 S. Ct. 432, 62 L. Ed. 1049); *Turpin v. Burgess, supra*, at p. 506; *Coe* v. *Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) It was said in *Coe v. Errol*, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (*Cf. Railroad Commission v. Texas & P. Ry. Co.*, 229 U. S. 336 (33 S. Ct. 837, 57 L. Ed. 1215); *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111 (33 S. Ct. 229, 57 L. Ed. 442); *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498 (31 S. Ct. 279, 55 L. Ed. 310).)

Applying these general principles or formulas to the facts of the present case, it seems reasonably clear that the sale of the oil, under terms requiring delivery to the ship of a foreign government, at which time title passed, was a step in its exportation. The case of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), is particularly pertinent here. In that case a Venezuelan firm requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from plaintiff Spalding, instructing it to deliver the same to a specified exporting carrier in New York addressed to the Venezuelan firm. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants,

who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to the firm in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, at page 69, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5, of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (*Turpin v. Burgess*, 117 U. S. 504, 506 (6 S. Ct. 835, 29 L. Ed. 988); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678).) An effort is made to distinguish that case on the ground that the delivery there involved was to a common carrier, while the delivery in the present case was to the purchaser's carrier. This distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (*Cf. Turpin v. Burgess; supra*, at p. 507; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 396 (50 S. Ct. 169, 74 L. Ed. 504); *Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in the Spalding case "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account." (262 U. S. at p. 70.) The law is not concerned with the means of shipment except

to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in light of all the circumstances, satisfies that inquiry. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. Under the Spalding case, to fix the step at which articles would be exempt from taxation "at any later point would fail to give the exports the liberal protection that hitherto they have received." (262 U. S. at p. 70.)

In some respects it would be more difficult to justify imposition of the tax in the present case than in the Spalding case because here the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, whereas in the Spalding case the sale was to an intermediary and the goods were merely delivered to the carrier.

The contention that the constitutional prohibition against state taxation of exports does not apply to exports originating in taxing states is answered by the decision in *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), where the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2, was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (*see Cook v. Pennsylvania*, 97 U. S. 566, 574 (24 L. Ed. 1015); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123, 134, 135 (19 L. Ed. 382)), the provision is general in its terms.

The prohibition of the federal Constitution, as interpreted by the United States Supreme Court, is not rendered inapplicable on the theory that the California statute levies the tax, not on the sales, but on the local business activities of the seller, and that, therefore, the tax is not an "impost" or "duty" on exports. Although the formal subject of the tax is the "privilege of selling" (Cal. Rev. & Tax. Code, § 6051; see *Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A.L.R. 838)), it is clear that the actual taxable event is the sale, or transfer of title or possession, and, in any event, the amount of the tax is

expressly measured by gross receipts from sales. (Rev. & Tax. Code, §§ 6006, 6007, 6051.) The United States Supreme Court has stated that in constitutional law cases the formal subject of a tax as declared by a state statute may be disregarded if the tax is in reality on something else, and it has held that taxes purporting to be on local business activities may be unconstitutional if they are in substance on interstate or foreign transactions. (See, for example, *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439 (59 S. Ct. 325, 83 L. Ed. 272); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292, 294 (38 S. Ct. 126, 62 L. Ed. 295).) In the Crew-Levick case the court said (p. 294) that "we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." The court held that a Pennsylvania license tax of $3, together with "one-half mill additional on each dollar * * * of business transacted annually," which in effect covered both local and foreign business, was unconstitutional because it "operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions (exporting merchandise)." (245 U. S. at p. 297.) In like manner, the California sales tax, measured by gross receipts from sales, cannot be applied to export sales since it would withhold "a part of every dollar received in such transactions."

In the early case of *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678), where the state argued that a license tax on importers did not contravene article I, section 10, clause 2, since it was a tax on the person rather than the article, the Supreme Court said (at p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add

to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And, in the more recent case of *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), it was expressly held that a state license tax on wholesale vendors of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (*Cf. United States v. Hvoslef*, 237 U. S. 1 (35 S. Ct. 459, 59 L. Ed. 813); *Fairbank v. United States*, 181 U. S. 283 (21 S. Ct. 648, 45 L. Ed. 865).) Thus, to the extent that the so-called privilege tax is measured by gross receipts from exports, under the existing decisions of the United States Supreme Court it amounts to a tax on exports and is improper.

It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a nondiscriminatory tax although the tax may have some incidental effect on interstate commerce. Thus if the present case involved the commerce clause rather than the import-export clause of the federal Constitution, it may be that the tax could properly be imposed, since it falls equally without discrimination, upon all sales in the state, whether the goods are destined for local use or for export. In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), for example, an Indiana gross receipts tax was upheld although the goods were sold to an out-of-state buyer and, similar to the situation in the Spalding case, were delivered to a *common carrier* in the taxing state for transportation out of the state. It is somewhat difficult to reconcile these cases upon any other basis than that one concerned foreign commerce and the other interstate commerce.

It does not follow, however, that the views expressed in the Spalding and Crew-Levick cases with respect to imports and exports have been superseded by the interstate com-

merce decisions. The cases relate to different clauses of the Constitution and involve both different language and different purposes and policies. While a few cases have suggested that the prohibitions of the commerce and import-export clauses of the Constitution are substantially identical insofar as taxation is concerned (*Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292, 295 (38 S. Ct. 126, 62 L. Ed. 295); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678)), other cases have rejected even an analogy between the two. (*Sonneborn Bros. v. Cureton*, 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095) (refusing to apply original package doctrine to sales of articles transported in interstate commerce); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123 (19 L. Ed. 382); cf. *Fairbank v. United States*, 181 U. S. 283, 306 (21 S. Ct. 648, 45 L. Ed. 862).)

The latest decision of the United States Supreme Court involving state taxation of articles in foreign commerce expressly rejects the analogy of the interstate commerce cases. (*Hooven & Allison Co. v. Evatt*, — U. S. — (65 S. Ct. 870, 877, — L. Ed. —).) The state tax there held improper was a general, nondiscriminatory property tax. Although the United States Supreme Court thus had the opportunity to apply the reasoning of the interstate commerce cases, it did not do so, and, further, not even the dissenting opinion discussed the possibility of revising the older cases but, instead, relied upon a factual distinction. (See note (1945) 58 Harv. L. Rev. 858-876.) Until such time as that court determines to permit nondiscriminatory state taxation of sales made in foreign commerce, it would seem improper for a state court to give its approval to such a tax.

The judgment, therefore, should be affirmed.

Edmonds, J., concurred.